No. 433

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

CANADIAN RIVER GAS COMPANY, a Corporation, and COLORADO INTERSTATE GAS COMPANY, a Corporation,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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September, 1940.

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v.

FEDERAL POWER COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Canadian River Gas Company and Colorado Interstate Gas Company, Petitioners herein, respectfully pray for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered March 4, 1940, (R. p. 47) rehearing denied July 24, 1940. (R. p. 64), granting a motion to dismiss a petition to review an order of the Federal Power Commission entered in a proceeding against petitioners under the Natural Gas Act (52 Stat. 821), which order definitely and finally determined the status of Petitioners as Natural Gas Companies under said Act (R. p. 21), contrary to the contentions of Petitioners.

STATEMENT

Following the enactment of the Natural Gas Act, approved June 21, 1938, and on July 5th of that year, the Federal Power Commission issued its Order No. 51 entitled "Instituting an Investigation of Natural Gas Companies and Directing the Filing of a Report." (R. p. 13) This Order included a questionnaire. The Order was shortly thereafter served upon Petitioners, and they made detailed and complete responses thereto, under oath, but under written reservation that such responses "should not be construed as a waiver by the Company of its rights to contest the jurisdiction of the Commission * * *."

As showing the purpose of said Order No. 51, we quote the following:

> "Now, Therefore, the Commission orders that:
>
> "(A) An investigation be and is hereby instituted to ascertain certain facts, conditions, practices or matters necessary and proper to aid the Commission in determining what persons are natural gas companies within the meaning of the Natural Gas Act, and in prescribing rules and regulations necessary and appropriate to carry out the provisions of said Act." (R. p. 14).

The only facts or "evidence" adduced in the course of said investigation and pursuant to said Order were the sworn responses of Petitioners which, as we contend, conclusively demonstrated that Petitioners were neither common carriers nor public utilities; that their properties had never been devoted to the public service; that their few contracts for the sale of gas were privately negotiated long before the enactment of the Act, and that they were therefore not natural gas companies within the meaning of the Act.

On the same day the Commission issued another Order, No. 53, entitled "Designating the Time for Filing of Schedules of Rates and Charges Under Section 4 (c) of the Natural Gas Act and Certain Reports in Connection Therewith." (R. p. 18) Although not having any "rates and charges" as contemplated by the Act, but only prices specified in the few privately negotiated contracts, Petitioners

nevertheless, with reservation of rights, filed, under oath, their said contracts in response to said Order. These contracts are described in the Order of March 14, 1939 (the Order sought to be reviewed), in paragraph (f) thereof (R. p. 21), and more particularly described as to dates of execution and dates of expiration at pages 31 and 32 of the Record.

Thereafter, on December 22, 1938, the City and County of Denver filed a complaint with the Commission against Petitioners and the Public Service Company of Colorado, alleging that the contract price for gas to the Public Service Company, a local distributing company, at the Denver Gate was unjust, unreasonable and discriminatory. To this complaint Petitioners filed a verified answer (R. p. 4) setting forth the facts as to the sale of gas under the contract with the Public Service Company, substantially as set forth in the responses to the prior Orders—Nos. 51 and 53—of the Commission above mentioned. They also set forth the facts and circumstances under which their contracts for the sale of gas were negotiated, and particularly the facts with reference to the contract with the Public Service Company for the supply of gas at the Denver Gate for the term beginning January 3, 1928, and ending February 8, 1947. In this verified answer it was alleged that the contract with the Public Service Company was not executed until a franchise ordinance was passed in Denver on February 8, 1927, requiring the Public Service Company to bring natural gas to Denver in case the City Council should determine that it was feasible. The City of Denver then employed an independent engineer, who reported to the Council that it was feasible, and that the Gate Rate subsequently provided for in said contract with the Public Service Company was reasonable. Thereupon Denver enacted an ordinance determining that the bringing of natural gas from the Amarillo Field to Denver was feasible, and ordered the Public Service Company to procure such gas. In this ordinance the rates to be charged by the Public Service Company to its local customers were fixed for a term ending February 8, 1947. Thereafter negotiations were completed by those interested in the organization of Petitioners and the representatives

of the Public Service Company, for a gas supply contract at such Gate Rate. It was further shown by said verified answer that the Colorado Interstate (the company so contracting with the Public Service Company) relied principally upon the contract for the sale of gas to the Public Service Company in making an investment of more than $20,000,000 to build the pipe line and make other necessary investments required to bring natural gas to Denver. Such line would not have been built, nor the capital ventured, but for said contract.

With all of this evidence before the Commission it proceeded to make its findings, and by its Order of March 14, 1939 (review of which is sought in this proceeding), it specifically refers to and implicates its Orders 51 and 53 and the responses thereto and the Denver Case.

Said Order of March 14, 1939, in paragraph (e) (R. p. 21) found that the Petitioners "are engaged in the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for re-sale for ultimate consumption for domestic, commercial, industrial, and other uses, *and are therefore natural gas companies within the meaning of the Natural Gas Act.*" (Emphasis ours.) Based upon such finding the Commission then initiated a proceeding for the purpose of determining whether the rates and contracts are unjust or unreasonable or discriminatory, and if so found, to determine and fix rates to be thereafter observed.

On April 12, 1939, Petitioners filed an Application for Rehearing in which they sought opportunity to present further evidence with respect to their status and contracts (R. p. 23) which on May 9, 1939, the Commission denied. (R. p. 37) In said Petition for Rehearing before the Commission it was shown that the articles of incorporation of the Petitioners contained this provision:

> "Provided that nothing herein shall be construed to authorize the corporation to transport natural gas for others as a common carrier for hire or to sell natural gas for others as a carrier for hire or to sell natural

gas except by special contracts, or to constitute the corporation a common purchaser of natural gas or a public utility corporation." (R. pp. 29 and 31.)

It was further shown that neither of the Petitioners ever exercised any rights or privileges of a public utility or held itself out as such; that neither of them ever claimed to possess or attempted to exercise the power of eminent domain (R. pp. 29 and 32); that neither of the companies ever held itself out to serve the public generally (R. p. 31), and that all of their contracts for the sale of gas were privately negotiated (R. p. 31). In denying the Application for Rehearing the Commission by reference made its opinion, No. 37, in *Re East Ohio Gas Company,* 28 P.U.R. (N.S.) 129, its opinion in our case. As appears from the opinion, the Commission had pursued the same method of investigation in the East Ohio Case. This opinion, we submit, makes it clear that the Commission had satisfied itself with respect to the status of these companies, and also that their contracts were subject to abrogation if found to be unreasonable or discriminatory. We have, then, an order in all respects meeting the test of reviewability laid down by this Court in *Rochester Tel. Corp. v. United States,* 307 U. S. 125, 83 L. Ed. 1147, namely, primary resort and administrative finality. The Commission proceeded with its investigation until it was through, so far as this question of status is concerned. The denial of the Petition for Rehearing, in which the various matters above referred to were brought to the attention of the Commission, shows conclusively that the Commission was through with its investigation, so far as status is concerned, and with respect to the legal questions raised, the Commission in the East Ohio Gas Case said:

"The circumstance that the company transports gas for 'its own account' which is 'owned by it and purchased by it from a single vendor under private contract,' does not exempt the company from the Natural Gas Act, as the Act is not restricted in its application to companies engaged in the transportation of natural gas in interstate commerce as 'common carriers', but

applies to all 'engaged in the transportation of natural gas in interstate commerce.' "

The Commission further said:

> "The company claims that it is not transporting natural gas in interstate commerce as a public utility, 'and cannot constitutionally be declared such by the legislative fiat of Section 1 (a) of the Natural Gas Act.' It is not within the Commission's province to pass upon the constitutionality of statutes enacted by Congress."

On July 7, 1939, Petitioners filed their Petition for Review in the Circuit Court of Appeals (R. p. 1 *et seq.*). Thereafter the Power Commission filed its Motion to Dismiss. The Commission never filed any Transcript with the Court. The Motion to Dismiss was sustained, and opinion rendered under date of March 4, 1940, (R. p. 39) and final Order entered on Petition for Rehearing and Opinion rendered under date of July 24, 1940, sustaining the Motion to Dismiss. (R. p. 60.)

STATEMENT OF BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

Section 19 (b) of the Natural Gas Act (52 Stat. 831, USCA Title 15, Section 717 (r)), after providing for review of orders of the Federal Power Commission by the United States Circuit Court of Appeals, provides:

> "The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in Sections 239 and 240 of the Judicial Code, as amended (USC Title 28, Secs. 346 and 347.)"

QUESTIONS PRESENTED.

The questions involved in this case are the following:

1. Whether the Circuit Court of Appeals had jurisdiction to entertain the Motion to Dismiss filed by the Commission, in view of the failure of the Commission to file the Transcript of Record as required by Section 19 (b) of the Natural Gas Act.

2. Whether the Order of March 14, 1939, was a reviewable order.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals in this case has decided an important question of Federal law which, so far as the Natural Gas Act is concerned, has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals in this case has decided Federal question in a way probably in conflict with applicable decisions of this Court.

It is submitted that there is a grave question whether the lower court had jurisdiction to entertain the Motion to Dismiss in the absence of a Transcript of Record, in view of the decision of this Court in the *Matter of the Petition of the National Labor Relations Board for a Writ of Prohibition and for a Writ of Mandamus*, 304 U. S. 486. We submit also that there has been in this case the primary resort and administrative finality in a recent decision said by this Court to constitute the test of reviewability (*Rochester Tel. Corp. v. United States*, 307 U. S. 125), and that the lower court erroneously concluded that that decision was inapplicable.

For these reasons, which will more fully appear in the attached brief, it is respectfully submitted that the writ should be granted.

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Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Tenth Circuit will be found at page 39 of the Record and is reported in 110 Fed. (2d) 350. It was dated March 4, 1940. Rehearing was denied July 24, 1940. (R. p. 64) The opinion on Petition for Rehearing will be found at page 60 of the Record. It is not yet reported.

II.

JURISDICTION

The jurisdiction of this court is invoked under Section 19 (b) of the Natural Gas Act (52 Stat. 831, U.S.C.A. Title 15, Section 717 (r)).

III.

STATEMENT OF THE CASE

This appears beginning on page 2 of the Petition for Certiorari.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

It is respectfully submitted that the Circuit Court of Appeals erred:

1. In assuming, as it apparently did, although not discussed in either of the opinions, that it had jurisdiction to entertain the Motion to Dismiss filed by the Commission notwithstanding the failure of the Commission to file with the court the transcript of record as required by Section 19 (b) of the Natural Gas Act.

2. In holding that the order of March 14, 1939, was not a reviewable order.

V.

ARGUMENT

1. The Circuit Court of Appeals had no jurisdiction to entertain the Motion to Dismiss in view of the failure of the Commission to certify and file the transcript of record.

Following the denial by the Commission of our Petition for Rehearing with respect to the order of March 14, 1939, and on July 7, 1939, the Petition for Review was filed. Shortly thereafter the Power Commission filed its Motion to Dismiss but never at any time certified or filed with the court

a transcript of the record upon which the order complained of was entered. Section 19 (b) of the Natural Gas Act provides:

> "A copy of such petition shall forthwith be served upon any member of the Commission *and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript, such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part.*" (Emphasis ours.)

The provision of the National Labor Relations Act with respect to this subject is the same as that just quoted above from the Natural Gas Act, and *In The Matter of the Petition of the National Labor Relations Board for a Writ of Prohibition and for a Writ of Mandamus*, 304 U. S. 486, this court considered the jurisdiction of the court to take action in the absence of the certification and filing of the transcript of record with the court and held:

> "Here it is quite plain that the court is without jurisdiction to take action at the behest of the Board until transcript shall have been filed and notice of the petition and transcript have been served."

2. The order of March 14, 1939, is a reviewable order.

As shown in the statement of the case in the Petition, the order of March 14, 1939, was the culmination of an administrative process before the Commission initiated by its General Orders 51 and 53 under date of July 5, 1938. These orders and the questionnaires attached, which were fully complied with and answered by Petitioners, gave to the Commission all of the information by it deemed appropriate for the purpose of determining the status of Petitioners and the jurisdiction of the Commission over Petitioners and its right to abrogate Petitioners' contract prices, if found to be unreasonable or discriminatory, and to substitute therefor regulated rates.

This is manifest from Subdivision (e) of the Order of March 14 which finds and decides that Petitioners

> "are engaged in transportation of natural gas in interstate commerce and sale in interstate commerce of natural gas for resale for ultimate public consumption, domestic, commercial, industrial, and other uses, and are, therefore, natural gas companies within the meaning of the Natural Gas Act," (R. p. 21).

and also by the final provision of said Order wherein investigation was instituted concerning the rates and contracts of Petitioners, which, of course, would be a futile thing if, as a matter of fact and of law, Petitioners were not subject to the jurisdiction of the Commission, or if its contracts for the sale of gas for ultimate public consumption, made some ten years prior to the passage of the Natural Gas Act, were not subject to abrogation.

That the Commission had received and considered all evidence bearing upon status and jurisdiction and the right of the Commission to abrogate Petitioners' contracts, which it deemed pertinent, is demonstrated by the overruling of the Petition for Rehearing in which Petitioners set forth fully the facts and circumstances with respect to their status and their contracts. This is further conclusively demonstrated by its opinion No. 37 *In Re East Ohio Gas Co.*, 28 P.U. R. (N.S.) 129, which the Commission adopted as its opinion in the overruling of the Petition for Rehearing filed by Petitioners herein. In Re East Ohio Gas Case the identical investigation had been made pursuant to General Orders 51 and 53 and a similar application for rehearing had been made. In that opinion the Commission said:

> "The company further asserts that the findings made and the facts assumed by the order are not based upon any evidence disclosed to the company or appearing in the record herein. The Commission, on July 5, 1938, by its Order No. 51, entered pursuant to the authority vested in it by Sections 10 and 14 of the Natural Gas Act, *instituted an investigation* of natural gas companies and directed the filing of reports by such com-

panies. On August 15, 1938, The East Ohio Gas Company filed a response to the questionnaire authorized by said Order No. 51, and supplied the information called for thereby, including a map showing the location of its facilities, and a description of the use and method of operation of its facilities. *From the information thus supplied* by The East Ohio Gas Company, the Commission acquired considerable familiarity with the operations of the company. The Commission did not assume any facts which were not already known to The East Ohio Gas Company and supplied to the Commission by that company." (Emphasis ours.)

The Commission further said respecting the legal questions raised by the Gas Company:

> "The circumstance that the company transports gas 'for its own account' which is 'owned by it and purchased by it from a single vendor under private contract' does not exempt the company from the Natural Gas Act, as the act is not restricted in its application to companies engaged in the transportation of natural gas in interstate commerce as 'common carriers,' but applies to all 'engaged in the transportation of natural gas in interstate commerce.' "

The Commission further said:

> "The company claims that it is not transporting natural gas in interstate commerce as a public utility 'and cannot constitutionally be declared such by the legislative fiat of Section 1 (a) of the Natural Gas Act.' It is not within the Commission's province to pass upon the constitutionality of statutes enacted by Congress."

It is our contention that the case at bar falls directly and squarely within the doctrine of *Rochester Tel. Corp. v. United States*, 307 U. S. 125. In that case the Rochester, claiming that it came within an exemption and therefore not subject to the Communications Act, refused to comply with certain general orders of the Commission. Whereupon the Commission ordered a hearing at which the Rochester should show cause why it should not comply with such orders. Following the hearing before an examiner, the Com-

munications Commission adopted his tentative report to the effect that the Rochester was not within the exemption and accordingly was subject to the Act and made its order classifying the Rochester as a carrier subject to the Act. This court held such order to be reviewable because it determined the rights, obligations and status of the company under the Act.

In our case, the Commission, having obtained all of the information which it deemed material or relevant on the issue under consideration, made its findings as to our status, rights and obligations under the Act. In the Rochester Case, the Commission did nothing more for the time being, whereas in our case, by the same order, it initiated a proceeding for the purpose of determining the reasonableness of Petitioners' rates and the abrogating of their contracts if found unreasonable or discriminatory. But this additional matter covered by the order in our case, we submit, did not limit or detract from the conclusiveness of the determination of status already made in said order, and does not justify any distinction between the two cases. The determination of status in the Rochester Case, as said by Mr. Justice Frankfurter, subjected the Rochester immediately to previously formulated general orders of the Commission. Although he did not say so, such determination also, of course, immediately subjected the Rochester to the mandatory and prohibitory provisions of the Act, and although he did not say so, such determination, of course, also immediately subjected the Rochester to all subsequent general and special orders which the Commission might make in the performance of its duties under the Act. In the original opinion of the Circuit Court of Appeals in our case, the court limited the application of the Rochester Case to cases where there were outstanding and uncomplied with previously formulated general orders. We submit that that is a very narrow construction of the language used and the holding made in the Rochester Case. In the Rochester Case, Mr. Justice Frankfurter said:

> "From these general considerations, the court evolved two specific doctrines limiting judicial review

> of orders of the Interstate Commerce Commission. *One is the primary jurisdiction doctrine,* firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426. Thereby matters which called for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. *The other is the doctrine of administrative finality.*" (Emphasis ours.)

Thereupon the court applied these two tests to the Rochester Case and then used this language, which we submit is directly applicable to our situation:

> "The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration regarding the status of the Rochester under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, *in conjunction with other orders,* made determination of the status of the Rochester a reviewable order of the Commission." (Emphasis ours).

The same doctrine was enunciated in *Federal Power Commission v. Pacific Power & Light Co.*, 307 U. S. 156; that is, that the test of reviewability is primary recourse and administrative finality.

In our case, there was no attempt on the part of Petitioners to seek relief in court until the administrative process involving status and the abrogation of contracts had run its course and was definitely and finally concluded by the overruling of the Petition for Rehearing. Thus, there was full compliance with the first test, namely, that of the primary jurisdiction doctrine, and there was also administrative finality with respect to this question of status.

We call particular attention to Note 11 appended to the decision in the Rochester Case, where Mr. Justice Frankfurter deals with and overrules the cases of *Lehigh Valley v. United States,* 243 U. S. 412, and *Piedmont & Northern Ry. v. United States,* 280 U. S. 469. These cases are discussed in the opinion on rehearing in the case at bar as if we had cited them in support of our position, whereas we referred in our argument to the disposition made of these two cases by this court in Note 11, wherein the court clearly indicates that in these two cases the orders should have been held to be reviewable, whereas they were decided otherwise. In that Note, referring to the Lehigh Valley Case, it was said:

> "Therefore, the Commission's order that the Lehigh Valley was subject to the Panama Canal Act was responsible for the risk as much as if it had expressly commanded the Lehigh to stop running its boat lines, and assuming the Lehigh was within the prohibition of the statute, the Commission's order denying an exemption had the same practical effect as a direct command."

Discussing the Piedmont Case in the Note, it is said:

> "The bill to enjoin the Commission from taking any proceeding against the Piedmont & Northern under this order attacked the action of the Commission solely on its assumption of jurisdiction. The court held that the order was not reviewable on the ground that the order did not adjudicate the railroad's status, did not command it to do anything but only had the effect of increasing the Piedmont's doubts as to the correctness of its construction of the statute. To be sure, statutory construction is a judicial function, *but this is to view the matter too abstractly,* for the Commission itself had instituted the system whereby it requested preliminary submission to it of the status of 'interurban roads'. Such a decision was at least the equivalent of a *threat of prosecution under the statute,* and, in fact, considerable weight is given to administrative practice in ascertaining the meaning of such legislation." (Emphasis Ours.)

In our Petition for Rehearing, we brought to the attention of the court the fact that there were many mandatory and prohibitory provisions in the Natural Gas Act itself to which Petitioners immediately became subject when the Commission in the Order of March 14, 1939, made its findings with respect to the status of Petitioners and particularly after the Commission had overruled their Petition for Rehearing. We also brought to the attention of the court three important general orders made subsequent to the Order of March 14, 1939, and which Petitioners had not complied with and did not intend to comply with until their status was finally determined. These Orders will be found beginning at page 53 of the Record. The Circuit Court of Appeals, however, disregarded our contention to the effect that inasmuch as Petitioners, upon the entry of the Order of March 14, 1939, became immediately subject to the mandatory and prohibitory provisions of the Natural Gas Act, our case came squarely within the doctrine of the Rochester Case. With respect to the general orders subsequently entered, the court held that the question of whether the Order of March 14, 1939, is reviewable must be determined under the facts existing at the time the Petition for Review was filed. We submit that the mandatory and prohibitory provisions of the Act itself furnish just as good reason for holding the order reviewable as did the previously formulated mandatory general orders of the Commission referred to in the Rochester Case, and that the application to Petitioners of the three general orders subsequently issued followed as a necessary consequence of the Order of March 14, 1939. Such orders had to be issued and applied to such companies as the Commission found to be subject to its jurisdiction, in order to carry out the purposes of the Act.

In view of the necessary consequences to Petitioners under the broad regulatory provisions of the Natural Gas Act, and the important question of status and the right of the Commission to abrogate contracts made long prior to any action by the Congress in this field, surely good policy and fair dealing suggest a judicial determination of these questions in advance of the incurring by both the Government and Petitioners of enormous expense in going through

the regulatory process concerning rates, and that, we submit, is the philosophy and the background of the decision of this court in the Rochester Case.

We submit also that a different conclusion cannot be reached, because technically it may be said that this is an "interim order" or an "interlocutory order" or "a step in procedure." These were convenient terms frequently used in cases decided prior to the Rochester Case, just as the term "negative order" found its place in a philosophy wholly at variance with that found in the Rochester Case. The point is, that on this important issue of status and contracts we have a final order, with the serious and important consequences to Petitioners if they are right in the position which they take as to their status and contracts and the jurisdiction of the Commission; and we repeat, we have the primary resort and the administrative finality which Mr. Justice Frankfurter in the Rochester Case correctly held to be the test of reviewability.

We cite the case of *Valvoline Oil Co. v. U. S.*, 308 U. S. 141, 84 L. Ed. 112, which was decided after the Rochester Case, in which the unanimous opinion of the court was rendered by Mr. Justice Reed. In that case the Interstate Commerce Commission was engaged in the valuation of the Valvoline Company (an oil pipeline company), and in aid of such proceeding issued an order requiring the Valvoline Company to submit certain maps, charts, schedules and other data. The company brought suit under the Urgent Deficiencies Act to enjoin the enforcement of the order, claiming it was not a common carrier of oil, and was not subject to the Interstate Commerce Act. The court entertained the case, as did this court, without either court or commission or the United States even raising the question that there was involved only an "interim order" or an "interlocutory order," or that the order in question was "a mere step in procedure." This, we submit, is an additional confirmation of our contention with respect to the breadth and scope of the Rochester Case.

We submit also that such cases as *U. S. v. Los Angeles*, 273 U. S. 299, and *U. S. v. Illinois Central R. Co.*, 244 U. S.

82, cited in the original opinion of the Circuit Court of Appeals as being apposite, have no application whatsoever to the situation involved in the case at bar, particularly after the decision in the Rochester Case. Neither involved an order determining status.

It is perhaps unnecessary to remind the court that we have not yet been allowed to present fully our argument on the question of status and contracts, as the case has been heard only on the question of reviewability.

For these reasons we respectfully submit that Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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CITATIONS

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v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The original opinion of the Circuit Court of Appeals (R. 39–47) is reported in 110 F. (2d) 350. Its opinion on the petition for rehearing (R. 60–64) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 4, 1940 (R. 47). A petition for rehearing filed by petitioners was denied on

July 24, 1940 (R. 64). The petition for a writ of certiorari was filed September 14, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTIONS PRESENTED

The Federal Power Commission issued two general orders directing all natural gas companies to supply certain information to aid the Commission in determining whether they were "natural gas companies" within the meaning of the Natural Gas Act of June 21, 1938 (and so subject to the jurisdiction of the Commission), and further directing them to file schedules of their rates for sales of gas subject to the Commission's jurisdiction. Petitioners complied with these orders. Thereafter the Commission ordered an investigation of petitioners' rates, practices, and contracts subject to the jurisdiction of the Commission. The order recited that it appeared to the Commission that petitioners were natural gas companies within the meaning of the Natural Gas Act. The questions presented are:

1. Whether the Commission's order of an investigation is subject to judicial review under Section 19 (b) of the Natural Gas Act; and

2. Whether, under that section, the Circuit Court of Appeals was without power to entertain a motion by the Commission to dismiss for want of jurisdiction, because the Commission had not filed a copy of the transcript of proceedings on which the order was based.

STATUTE INVOLVED

The pertinent portions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, are set out in the Appendix.

STATEMENT

Petitioners, the Canadian River Gas Company and the Colorado Interstate Gas Company, hereafter referred to as the Canadian Company and the Colorado Company, respectively, are Delaware corporations (R. 1, 20, 26). The Canadian Company is engaged in the production and transportation of natural gas, and owns and operates a gas pipe line extending from the Amarillo Field in Texas to Clayton, New Mexico (R. 2, 8, 20, 26). The Colorado Company is engaged in transporting natural gas to various places in Colorado, and operates a gas pipe line from Clayton, New Mexico, to a point near Denver, Colorado (R. 8, 20, 26, 40). Gas is sold by both companies by private contract only (R. 2, 38).

The Federal Power Commission, on July 5, 1938, issued two general orders, Nos. 51 and 53 (R. 13–20.) Order No. 51 directed all natural gas companies to furnish certain information respecting their operations, to aid the Commission in determining whether they were "natural-gas companies" within the meaning of the Natural Gas Act. (If the companies were "natural-gas companies" within the meaning of the Act, they were subject to the jurisdiction of the Commission.) Order No.

53 directed the companies to file schedules of all rates subject to the Commission's jurisdiction. Petitioners complied with these orders, but stated that their compliance was under duress and that the Commission did not have jurisdiction over them under the Natural Gas Act (R. 2, 25).

The Colorado Company had for some years sold gas, under a contract, to the Public Service Company of Colorado (R. 5, 22). The gas so sold was purchased by the Colorado Company from the Canadian Company (R. 2, 5, 26). On December 22, 1938, the City and County of Denver filed a complaint with the Commission against petitioners and the Public Service Company, alleging that the Colorado Company's price for gas to Public Service was unreasonable, and praying that the Commission fix reasonable rates (R. 21–22). On March 14, 1939, the Commission ordered that an investigation be instituted to determine whether petitioners' rates were unreasonable and, if the rates were found to be so, to fix new rates (R. 20–23). The order recited that it appeared to the Commissioner that petitioners were both engaged in interstate commerce and were natural-gas companies within the meaning of the Natural Gas Act (R. 21). An application by petitioners for a rehearing and stay of the order of March 14, 1939 (R. 23–25), was denied by the Commission on May 9, 1939 (R. 37–38).

Petitioners, pursuant to Section 19 (b) of the Natural Gas Act, petitioned the court below to review the order of March 14, 1939 (R. 1–11). The Commission's motion to dismiss (R. 39) was sustained upon the ground that the order for investigation did not of itself adversely affect petitioners' rights and did not require obedience to any other order with which petitioners had not complied (R. 39–47).

Petitioners petitioned for rehearing (R. 48–59), asserting that since the issuance of the order of March 14, 1939, the Commission had issued three general orders, Nos. 63, 65, and 69, directing all natural gas companies as defined in the Natural Gas Act to make certain financial, statistical, and rate reports and to follow a prescribed accounting procedure; that petitioners had not complied with any of these orders; and that Sections 4, 7, 8, and 10 of the Act, dealing with the export of gas, abandonment of facilities, the Commission's access to records of the gas companies, and periodic reports of such companies to the Commission, would all automatically become applicable to petitioners because of the Commission's recital in its order of March 14, 1939. Petitioners further contended that the court was without jurisdiction to dismiss on motion of the Commission because the Commission had failed to file with the court a transcript of the proceedings on which the order of March 14, 1939, was based.

The petition for rehearing was denied (R. 60–64). The court held that whether the order of March 14, 1939, was subject to review must be determined as of the date of the petition for review (R. 60). It did not consider the application of Sections 4, 7, 8, and 10, or the further question of its jurisdiction to entertain the motion.

ARGUMENT

1. The decision of the court below follows principles which have been laid down by this Court. An order of an administrative body instituting an investigation, like an order setting a case down for hearing is not subject to judicial review. *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; cf. *Federal Power Comm'n* v. *Edison Co.*, 304 U. S. 375, 385–386. Such an order "does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action." *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 130.

In the *Rochester* case, which petitioners invoke, this Court held that an order of the Federal Communications Commission determining that the company was subject to its jurisdiction and hence was bound by prior general orders directing all such companies to file their charges and certain documents and information with the Commission, was reviewable in the courts, and that the form of the order, whether negative or affirmative, was immaterial. In *Valvoline Oil Co.* v. *United States*,

308 U. S. 141, also relied upon by petitioners, the facts were substantially identical with those of the *Rochester* case, and the right to judicial review was not contested or discussed.[1]

These decisions do not aid petitioners, since they had already complied with the Commission's prior orders Nos. 51 and 53. Moreover, the statement in the order for investigation that petitioners were "natural gas companies" within the meaning of the Natural Gas Act was, as the court below said, "a mere preliminary finding" (R. 62). Unlike the orders reviewed in the *Rochester* and *Valvoline* cases, it does not purport to make applicable to petitioners any other orders of the Commission. It was entered without notice or hearing (R. 24), and the jurisdictional issue is one of the questions for determination after full hearing.[2] Petitioners' effort to obtain judicial

[1] In the *Valvoline* case, as fully appears from the opinion of the district court (25 F. Supp. 460), the Interstate Commerce Commission had issued a general order directing all pine-line companies subject to its jurisdiction to file certain documents and information with the Commission. The Valvoline company contended that it was not a common carrier subject to the Commission's jurisdiction and petitioned the Commission to grant a hearing on the question. The petition was granted, and after two full hearings the Commission found that the company was subject to its jurisdiction and directed the company to comply with its general order.

[2] Petitioners applied to the Commission for a "rehearing" in respect of the challenged order upon the ground, *inter alia*, that they were denied notice and an opportunity to be

relief before their administrative remedy is exhausted is "at war with the long-settled rule of judicial administration." *Federal Power Comm'n* v. *Edison Co., supra,* at 385; *Rochester Tel. Corp.* v. *United States, supra,* at 130–131.

Petitioners contend that the Commission's recital in its order for investigation subjects them to the Commission's subsequent orders and to the provisions of Sections 4, 7, 8, and 10 (a) of the Natural Gas Act, and that the order for investigation is therefore reviewable. But the Commission's preliminary statement as to jurisdiction is not final and does not purport to make applicable to petitioners the cited provisions of the Natural Gas Act or any other orders of the Commission. And there are other and equally conclusive answers to the contention. Sections 4, 7, and 8 of the Natural Gas Act are inoperative since the petitioners are not attempting to export gas or abandon their facilities, and since the Commission has not ordered petitioners to give the Commission access to their records or accounts. Section 10 (a) does not impose any obligations on petitioners to file reports except as the Commission may by regu-

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heard (R. 23, 24–25). The Commission denied the application, relying on its prior opinion in *Re East Ohio Gas Company*, 28 P. U. R. (N. S.) 129 (R. 37–38). There is nothing in that opinion to suggest that petitioners would be denied a full hearing on the jurisdictional issue before issuance of any final order, and, in fact, the Commission has granted such hearings in other proceedings.

lation require. So far as appears, the only reports required by the Commission under this section with which petitioners have not complied are those prescribed by orders Nos. 63, 65, and 69. It has never been held that such subsequent orders render reviewable an earlier order which was not reviewable when issued, which may have been years before.

2. Section 19 (b) of the Natural Gas Act directs the Commission, upon receipt of a petition for review, to file a certified copy of the record, and declares that "Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part." Petitioners contend that, since the Commission had not filed the record, the court below was without jurisdiction to entertain the Commission's motion to dismiss.

As has been shown, the court below was without jurisdiction to afford the review sought by petitioners, and since this lack of jurisdiction was apparent on the face of the petition for review surely the court was not required to await the filing of the record before dismissing the petition for review. A more dilatory procedure would have resulted only in added expense.

The question presented by this contention is, moreover, unimportant and presents no conflict of decision. In this connection petitioners cite only *In the Matter of the National Labor Relations Board,* 304 U. S. 486. There an employer sought

review in a circuit court of appeals of an order which had been entered against it by the Board. Thereafter the Board vacated its order and restored the case to its docket for reconsideration; accordingly it did not file in the court a certified copy of the transcript of record. The circuit court of appeals thereupon enjoined the Board from taking any further steps in the cause until the transcript was filed. On application of the Board for writs of mandamus and prohibition this Court held that the circuit court of appeals was without jurisdiction to enter its order. "Since the statute empowers the Board, before the filing of a transcript, to vacate or modify its orders, certainly it does not confer jurisdiction upon the reviewing court to prohibit the exercise of the granted power" (304 U. S. at 494). This holding is, of course, far removed from the question, here presented, whether the circuit court of appeals could dismiss the petition for review without awaiting the filing of the record since it appeared from the face of the petition that the court was without jurisdiction to entertain it. Petitioner quotes (p. 11) the remark of this Court in its opinion in the *Labor Board* case that the circuit court of appeals had no jurisdiction "to take action at the behest of the Board" until the transcript was filed. This statement had reference to a petition by the Board for enforcement of its order, and does not bear upon the question at bar.

CONCLUSION

The petition presents no doubtful question of public importance, and there is no conflict of decisions. It is therefore respectfully submitted that the petition should be denied.

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APPENDIX

Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821 (15 U. S. C. Supp. V, Secs. 717c, 717i, 717m, 717r):

SEC. 4 (c). Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this chapter takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

SEC. 10. (a) Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this chapter. The Commission may prescribe the manner and form in which such reports shall be made, and require from such natural-gas companies specific answers to all questions upon which the Commission may need information. The

Commission may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other reserves, cost of facilities, cost of maintenance and operation of facilities for the production, transportation, or sale of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, use, and sale of natural gas. The Commission may require any such natural-gas company to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) It shall be unlawful for any natural-gas company willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this chapter or any rule, regulation, or order thereunder.

SEC. 14. (a) The Commission may investigate any facts, conditions, practices, or matters which it may find necessary or proper in order to determine whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order thereunder, or to aid in the enforcement of the provisions of this chapter or in prescribing rules or regulations thereunder, or in obtaining information to serve as a basis for recommending further legislation to the Congress. The Commis-

sion may permit any person to file with it a statement in writing, under oath or otherwise, as it shall determine, as to any or all facts and circumstances concerning a matter which may be the subject of investigation. The Commission, in its discretion, may publish in the manner authorized by section 825k of Title 16, and make available to State commissions and municipalities, information concerning any such matter.

SEC. 19. (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. * * *

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